257. On September 10, 1997, the U.K. Government redeemed its special share in BT.[380] Through the redemption, the U.K. Government terminated its shareholding in BT and thus eliminated any role it might otherwise have had in BT's corporate events as a special shareholder. We thus find that WorldCom's concern is moot.

3. Cable Landing Licenses

258. Background. In two recent decisions, we explained that in examining the application of a foreign carrier or its affiliates to land and operate a submarine cable system under the Cable Landing License Act, we determine whether the applicant or its affiliate has market power in the destination market of the relevant cable.[381] If we determine that an applicant does have market power in the destination market, we examine the legal or *de jure* ability of U.S. carriers to have ownership interests in submarine cables landing in that market. If no explicit legal restrictions on ownership exist, we examine other factors to determine whether U.S. carriers have the practical or *de facto* ability to have ownership interests in cable facilities in the destination market(s).

259. Finally, we determine whether there are other factors that weigh in favor of, or against, granting this application under the Cable Landing License Act. We will make this determination whether or not the applicant or its affiliate has market power in the destination market of the relevant cable.

260. Discussion. MCI holds ownership interests in numerous international submarine cable systems landing in the United States.[382] Several of these cable systems, including TAT-12/13, extend between the United States and the United Kingdom, among other countries. None of the cables in which MCI owns a joint interest lands in a country other than the United Kingdom in which BT controls or is affiliated with a foreign carrier with market power.

261. Having determined above that BT has market power in the destination market, we examine the legal or *de jure* ability of U.S. carriers to have ownership interests in submarine cables landing in the United Kingdom. With the recent grant of U.K. international facilities licenses to new entrants, U.S. carriers are able to construct and operate submarine

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[380] DTI Press Release, "Government Redeems the BT Special Share" (Sept. 10, 1997).

[381] *See TLD Order*, *supra* note 52 (applying effective competitive opportunities analysis under the Cable Landing License Act to a common carrier cable system); *C&W Cable Landing License*, *supra* note 52 (applying effective competitive opportunities analysis under the Cable Landing License Act to a private cable).

[382] BT/MCI application, Vol. 2, Part II.A.

cables landing in the United Kingdom. No party has suggested, and we have no indication, that there are any practical barriers to the landing of a submarine cable in the United Kingdom. Accordingly, we find that the United Kingdom affords U.S. carriers effective competitive opportunities to construct and own submarine cables and cable stations on the U.K. end.

262. The International Bureau informed the Department of State of this application.[383] The Department of State, after coordinating with the Department of Commerce's National Telecommunications and Information Administration and with DoD, stated that it approves the transfer of control of MCI's and its subsidiaries' cable licenses to BT, subject to the Commission imposing two conditions.[384] First, if the Commission does not accept the agreement among DoD, the FBI and MCI and BT (discussed below),[385] the Department of State approval is subject to any cable landing station being at least 80 percent U.S.-owned. Second, any carrier seeking to provide a common carrier service through the acquisition or use of capacity on any cable on which MCI is a licensee must obtain Section 214 authorization. The Department of State also requests that the Commission notify it of any other filings under the Cable Landing License Act by MCI or its subsidiaries, and provide an adequate opportunity for review and comment to the Commission, as appropriate.

263. As discussed in Section V.B.2. below, we condition our grant of the transfer of MCI's licenses to BT upon compliance with the agreement reached among DoD, the FBI and MCI and BT. Thus, we need not impose the cable station ownership restrictions mentioned by the Department of State. Also, Commission rules already require all carriers seeking to provide a common carrier service over a submarine cable or any other transmission facility to hold a Section 214 authorization from the Commission.[386] Finally, under the Cable Landing License Act and accompanying Executive Order, we will notify the Department of State of any subsequent filings by MCI or its subsidiaries and provide an adequate opportunity for review and comment to the Commission, as appropriate.

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[383] Letter from Diane J. Cornell, Chief, Telecom. Div., Int'l Bur., FCC, to Steven W. Lett, Deputy U.S. Coordinator, Office of Int'l Communications and Information Policy, U.S. Department of State (Dec. 11, 1996). *See* 47 C.F.R. § 1.767(b); Exec. Order No. 10530, *reprinted as amended in* 3 U.S.C.A. § 301 at 1052 (1985).

[384] Letter from Alan P. Larson, Assistant Secretary of State for Economic and Business Affairs, U.S. Department of State, to Peter Cowhey, Chief, Int'l Bur., FCC (July 28, 1997).

[385] *See infra* Section V.B.2.

[386] 47 C.F.R. § 63.18.

264. After consideration of all of the relevant factors under our ECO analysis, we conclude that the United Kingdom offers effective competitive opportunities to U.S. carriers seeking to compete in each of the communications market segments that BT seeks to enter in the United States.

B. Additional Public Interest Factors Under the *Foreign Carrier Entry Order*

265. Under the framework set forth in the *Foreign Carrier Entry Order*, we consider other factors that are relevant to our overall public interest analysis for foreign carrier entry. These factors include cost-based accounting rates, and any national security or law enforcement issues, foreign policy, or trade concerns raised by the Executive Branch. We address these factors below. In addition, we consider the competitive impact of a foreign carrier's entry into the U.S. marketplace, which we have addressed above in Section IV, "Public Interest Analysis of the Merger."

1. Cost-based Accounting Rates

266. Background. The first additional public interest factor we consider is the presence of cost-based accounting rates. When BT/MCI submitted its application, the per-minute settlement rate[387] used to calculate net settlement payments for imbalanced minutes on the U.S.-U.K. route for traffic terminated by BT was .075 SDR ($0.11). Recently, the International Bureau approved a new, reduced settlement rate for this traffic of .05 SDR ($0.07).[388] Consistent with our International Settlements Policy (ISP), these rates must be made available to all U.S. carriers.[389]

267. As part of our ongoing effort to move accounting rates to more cost-based levels, we recently set caps on the settlement rates that U.S. international carriers may pay foreign carriers for the termination of switched traffic from the United States to other

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[387] The settlement rate refers to each carrier's portion of the accounting rate. In almost all cases, the settlement rate is equal to one-half of the negotiated accounting rate. At settlement, each carrier nets the minutes of service it billed against the minutes the other carrier billed. The carrier that billed more minutes of service pays the other carrier a net settlement payment calculated by multiplying the settlement rate by the number of imbalanced minutes.

[388] AT&T Request for Modification, ISP-97-M-207 (Apr. 4, 1997); WorldCom Request for Modification, ISP-97-M-222 (Apr. 10, 1997); Sprint Request for Modification, ISP-97-M-244 (Apr. 21, 1997); MCI Request for Modification, ISP-97-M-303 (May 8, 1997). None of these requests were opposed. Thus, under the Commission's rules, all were granted automatically 21 days after they were filed. 47 C.F.R. § 64.1001. These rates apply to all existing switched services, including mobile telephony, retroactively from April 1, 1997.

[389] *See infra* Section VI.D.

countries.[390] As of January 1, 1999, a U.S. international carrier may pay no more than a settlement rate of $0.15 to a carrier in the United Kingdom.[391] Moreover, as one of the conditions imposed on a carrier's authorization to provide international facilities-based services from the United States to an affiliated market, the International Bureau may, upon a finding of competitive distortion in the U.S. telecommunications market, require the carrier to reduce its settlement rate to our "best practice" rate.[392]

268. Contention of the Parties. AT&T argues that U.S. carriers are dependent on BT to terminate their traffic in the United Kingdom, and thus BT possesses market power to establish above-cost settlement rates for the completion of U.S. calls in the United Kingdom.[393] According to AT&T, BT's ability to maintain its settlement rates at above-cost levels while it competes in the U.S. market provides the means for BT to distort U.S. competition to benefit itself.[394] AT&T asserts that the only solution to prevent the potential for such outbound price distortion in the United States is to require BT to establish settlement rates for U.S. calls based on its forward-looking, total service long-run incremental cost of terminating U.S. calls.[395] AT&T estimates this cost to be no higher than $0.05-$0.06 per minute.[396]

269. BT/MCI respond that AT&T's arguments ignore the existence of effective competitive opportunities in the United Kingdom, which, according to BT/MCI, constrain BT's ability to distort competition on the U.S.-U.K. route. Moreover, according to BT/MCI, BT's current settlement rate approaches cost and is below both the Commission's applicable

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[390] *Benchmarks Order*, *supra* note 91.

[391] *Benchmarks Order* at ¶ 111 & Appendix C.

[392] *Benchmarks Order* at ¶¶ 207-231. The current "best practice" rate is $0.08. *See, e.g., id.* at ¶ 231.

[393] AT&T states that the U.K. regulatory rules do not require BT to lower its settlement rates to cost-based levels or to offer its correspondents BT's domestic interconnection rates. AT&T comments at 12 n.16.

[394] AT&T argues that unaffiliated U.S. carriers will be required to design their prices to recoup their costs, including the artificially high settlement rates they must pay to BT. BT, on the other hand, will be able to price MCI's U.S. outbound service based on BT's forward-looking, total service long run incremental costs to terminate MCI's minutes. (That MCI may pay a settlement rate to BT is, according to AT&T, merely a "left pocket-to-right pocket" transfer.) Thus, according to AT&T, BT/MCI's ability to price their outbound U.S. services at or near the effective settlement rate U.S. carriers pay will discourage entry and limit the participation of existing carriers on the U.S.-U.K. route. *Id.* at 14.

[395] *Id.* at 12-19.

[396] *Id.* at 13 n.20.

average benchmark for the first tier of countries and the U.K. country-specific benchmark rates.[397] The U.K. Government argues that a merged BT/MCI entity is both a reflection of the economic realities of a liberalized U.K.-U.S. route and, given an appropriate environment, a likely active agent for lower accounting rates.[398]

270. Discussion. As we stated in our *Foreign Carrier Entry Order*, we do not require cost-based accounting rates as a precondition to foreign carrier entry into the U.S. market.[399] We do, however, consider cost-based accounting rates as an additional public interest factor. In April 1997, BT agreed to lower significantly its settlement rate with U.S. carriers. The current settlement rate of $0.07 on the U.S.-U.K. route not only falls below the relevant benchmark, it is also lower than the "best practices" rate that we apply to remedy competitive distortions. Indeed, the settlement rate on the U.S.-U.K. route is one of the lowest in the world.[400] Given this development, we find that there is little risk of the market distortion AT&T fears. We thus decline to require further reduction to meet AT&T's estimate of a LRIC-based rate on this route. Moreover, we note that, like the FCC, OFTEL publishes U.K. carrier accounting rates for all U.K. international routes, promoting greater transparency in the international accounting rate process. Accordingly, we conclude that BT's proposed settlement rate on the U.S.-U.K. route is a positive public interest factor.

2. Executive Branch Concerns

271. We next address the national security, law enforcement and trade concerns raised by the Executive Branch in this proceeding. The public interest analysis articulated in the Commission's *Foreign Carrier Entry Order* requires us to consider certain Executive Branch concerns (*i.e.*, national security, law enforcement, foreign policy or trade concerns) regarding BT's entry into the U.S. market. Although the Executive Branch's comments were

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[397] BT also states that U.S. carriers have the ability to send U.K.-destined traffic to their own U.K. affiliates, CWC, and other U.S.-owned international facilities licensees in the United Kingdom. These licensees, according to BT/MCI, can terminate traffic to BT customers at interconnection rates that are cost-based and nondiscriminatory, and that soon will be based on LRIC. BT/MCI opposition & reply at 29.

[398] U.K. Government reply comments at 34. The U.K. Government also notes that the Commission's benchmark proposal is another possible mechanism for bringing down accounting rates expressed concern that, on competitive routes, this may create an artificial target price higher than the competitive level. *Id.*

[399] *Foreign Carrier Entry Order*, 11 FCC Rcd at 3899.

[400] *See also* MCI Request for Modification, ISP-97-M-402 (July 2, 1997) (settlement rate of .045 SDR ($0.06) with Telenordia AB of Sweden).

limited to merger-related issues, we address them here consistent with the framework established in the *Foreign Carrier Entry Order*.[401]

272. Comments. DoD states that there are national security issues raised by the proposed merger and transfer of control because of MCI's strong commercial relationship with DoD. As an example, DoD states that it has over 20 contracts with MCI, some of which are classified.[402] The Federal Bureau of Investigation (FBI) offers no comment on whether the proposed merger is in the public interest, but does express concern that national security and law enforcement considerations were not sufficiently addressed by BT/MCI's original application. The FBI states that it would be imprudent to authorize the merger without a more thorough discussion of these concerns.[403]

273. In *ex parte* communications, DoD, the FBI, and MCI (on behalf of MCI and BT) have informed the Commission that they have reached an agreement that resolves the national security, law enforcement, and public safety concerns that arise as a result of this merger.[404] The parties have submitted a copy of the executed agreement (Agreement), and propose that the Commission impose a specific condition requiring compliance with the principal components of the agreement. In brief, the Agreement provides that certain MCI and Concert facilities be located in the United States. The Agreement also states that Concert's subsidiaries providing domestic telecommunications services are required to adopt and maintain policies to prevent the improper use of Concert's network and facilities with regard to unauthorized electronic surveillance and unauthorized access to, or use or disclosure of, customer proprietary network information. MCI and Concert have also agreed to adopt and maintain certain policies with regard to confidentiality and security of electronic surveillance orders and authorizations, orders, legal process, and statutory authorizations and certifications related to subscriber records and information. Finally, MCI and Concert have

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[401] In the *Foreign Participation* proceeding, the Commission has proposed significant modification to the framework established in the *Foreign Carrier Entry Order* for applications from carriers from WTO-member countries to enter the U.S. market. However, it also proposes to continue to consider Executive Branch concerns in addressing such applications. *Foreign Participation Notice* at ¶ 43. If the Commission's proposals are adopted, we will continue to consider Executive Branch concerns in the context of foreign carrier applications to enter the U.S. market, either independently or by merger with existing U.S. carriers.

[402] DoD comments at 2.

[403] FBI comments at 2.

[404] Letter from Carl Wayne Smith, Acting General Counsel, Defense Information Systems Agency, to William F. Caton, Acting Secretary, FCC (May 28, 1997); Letter from John F. Lewis, Jr., Assistant Director in Charge, National Security Division, FBI, to William F. Caton, Acting Secretary, FCC (May 23, 1997); Letter from Stewart A. Baker, Steptoe & Johnson LLP, to William F. Caton, Acting Secretary, FCC (May 22, 1997).

agreed to implement certain measures requiring personnel security clearances, secure storage facilities, and the prevention of access by unauthorized personnel to secure or sensitive network facilities and offices.

274. In addition, the Irish American Unity Conference (IAUC) has alleged that the merger may raise some national security concerns. For example, the IAUC alleges that the British Government may be involved in inappropriate wiretapping of BT's lines in Northern Ireland on behalf of the British intelligence agency.[405] The IAUC also states that its national security concerns potentially raise privacy concerns and First Amendment issues. We make no finding on the substance of IAUC's allegations, which are beyond the scope of this proceeding. In any event, DoD and the FBI have carefully reviewed the U.S. national security implications of the proposed merger on behalf of the Executive Branch of the U.S. Government, and have indicated that all of their national security and law enforcement concerns are adequately addressed by their agreement with the parties. Moreover, the Executive Branch has not expressed concern that the proposed merger would negatively impact U.S. Government efforts in the United States or in Northern Ireland.

275. The Office of the United States Trade Representative (USTR), on behalf of the statutory inter-agency trade policy organization of the Executive Branch, also submitted comments requesting that we incorporate in this proceeding the Executive Branch comments filed in our *Foreign Participation* proceeding.[406] USTR noted that "no WTO obligations affecting this proceeding will come into effect prior to January 1, 1998"[407] Nonetheless, USTR urges the Commission to consider the impact of the proposed merger on competition in the United States as part of our overall public interest analysis.[408]

276. Discussion. We condition our grant of the transfer of MCI's licenses to BT on compliance with the Agreement signed by BT, MCI, DoD, and the FBI a copy of which is attached as Appendix A to this decision. We also incorporate USTR's comments from our *Foreign Participation* proceeding. We note that in Section IV "Public Interest Analysis of the Merger," above, we analyzed fully the competitive impact of the proposed merger as part of our public interest analysis.

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[405] *See* IAUC reply comments at 7; *see also* BT/MCI final reply comments (stating that the IAUC's comments are irrelevant to this proceeding).

[406] USTR *ex parte* comments (filed Aug. 13, 1997).

[407] *Id.* at 1.

[408] *Id.* at 2.

277. In sum, we find that under the framework established in the *Foreign Carrier Entry Order*, BT's entry into the U.S. market is consistent with the public interest. We next consider whether MCI's transfer of control of its DBS license is in the public interest.

C. Analysis of Transfer of Control of MCI's DBS License

278. BT/MCI have requested to transfer control of MCI's DBS license to BT.[409] The International Bureau, on delegated authority, granted MCI this license following MCI's successful participation in the Commission's DBS auctions.[410] Parties have filed applications for review of the Bureau's grant of this license.

279. The transfer of control of MCI's DBS license raises issues similar to those raised in the MCI DBS licensing proceeding. We defer consideration of these issues for resolution in connection with pending applications for review of the MCI DBS licensing orders. In the interim, BT will be permitted to acquire control of MCI's DBS license. However, that license will remain subject to reconsideration, and this approval of the transfer of control is specifically conditioned on whatever action the Commission may conclude is appropriate in connection with the pending applications for review.

280. Two additional matters warrant discussion. First, in the MCI DBS decision, the International Bureau indicated that the Commission "will consider all comments and public interest issues surrounding the proposed change in ownership of MCI as part of its separate and independent review of MCI's pending transfer of control applications."[411] We do not view this Bureau statement as in any way limiting our ability to consider matters raised concerning the MCI DBS license in whichever proceeding is appropriate. We note that the Bureau also stated that its action did not "prejudge or predetermine any of the recently filed transfer of control applications by MCI and BT. . . ."[412]

281. Second, we have received a letter from the Department of State, the Department of Commerce, and the Office of the U.S. Trade Representative requesting full

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[409] BT/MCI application, Vol. 2, Part II.J. The applicants seek authority for this transfer of control pursuant to Section 100.80 of the Commission's rules, 47 C.F.R. § 100.80.

[410] *See* MCI Telecommunications Corporation, *Order*, 11 FCC Rcd 16275 (Int'l Bur., 1996) (*MCI DBS Order I*), *Order*, DA 96-2165 (Int'l Bur., rel. Dec. 20, 1996) (*MCI DBS Order II*), *app. for review pending.*

[411] *MCI DBS Order I*, 11 FCC Rcd at 16283.

[412] *Id.* at 16278.

Commission review of issues related to foreign ownership of DBS subscription services.[413] These agencies ask that we "undertake and conclude a rulemaking proceeding" concerning these issues "prior to reaching a final determination on any application that may be affected by the outcome of the rulemaking."[414] In addition to the transfer of the DBS license, this proceeding involves the transfer of numerous other licenses and authorizations. We thus decline to withhold action on the instant transaction for the substantial additional time it would take to initiate and conclude a rulemaking proceeding. However, as we have indicated, our action is without prejudice to further consideration of these matters in connection with the MCI DBS licensing proceeding. We therefore do not view our action here as the type of "final determination" about which the Executive Branch agencies expressed concern.

VI. CONDITIONS AND SAFEGUARDS

A. Regulatory Treatment of MCI

282. BT/MCI have requested that MCI continue to be regulated as a non-dominant carrier on all routes, including those where BT or MCI is affiliated with a carrier in the destination market. Generally, the applicants argue that MCI's foreign-affiliated carriers do not have the ability to discriminate against unaffiliated U.S. carriers through the control of bottleneck services or facilities. Under the Commission's rules, a carrier that is affiliated with a foreign carrier that is not a monopoly in a destination market and that seeks to be regulated as a non-dominant carrier on that route bears the burden of demonstrating that its foreign affiliate lacks the ability to discriminate against unaffiliated U.S. international carriers through control of bottleneck services or facilities in the destination country.[415] In brief, the applicant must demonstrate that its foreign affiliate lacks market power.

283. Carriers regulated as dominant on a particular route due to a foreign carrier affiliation are required, under Section 63.10 of our rules, to do the following: (1) file tariffs on no less than 14-days notice; (2) maintain complete records of the provisioning and

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[413] Letter from Amb. Vonya B. McCann, U.S. Coordinator International Communications and Information Policy, Department of State, Hon. Larry Irving, Assistant Secretary for Communications and Information, Department of Commerce, and Amb. Jeffrey M. Lang, Deputy U.S. Trade Representative, Office of the U.S. Trade Representative, to Reed E. Hundt, Chairman, FCC (May 5, 1997).

[414] *Id.* at 2.

[415] 47 C.F.R. § 63.10(a)(3).

maintenance of basic network facilities and services procured from the foreign carrier affiliate;[416] (3) obtain Commission approval pursuant to § 63.18 before adding or discontinuing circuits; and (4) file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic.[417] These safeguards are to a great extent different than the safeguards the Commission traditionally has imposed on U.S. carriers regulated as dominant due to market power of the U.S. carrier on the U.S. end of a route.[418]

284. In the *Foreign Participation Notice*, we tentatively concluded that the current dominant carrier safeguards should be revised to be both effective but no more burdensome than necessary to prevent anti-competitive conduct in the provision of U.S. international services and facilities.[419] To this end, the *Foreign Participation Notice* proposes, among other things, to modify our current safeguards applicable to carriers regulated as dominant because

[416] The recordkeeping requirement for basic network facilities and services includes those facilities and services that the dominant carrier procures on behalf of customers of joint ventures for the provision of U.S. basic or enhanced services. *Foreign Carrier Entry Order*, 11 FCC Rcd at 3975.

[417] 47 C.F.R. § 63.10(c).

[418] Regulations associated with dominant carrier classification due to market power of the U.S. carrier on the U.S. end of a route include rate of return or price cap regulation to ensure that rates are reasonable, *see* 47 § 61.41(a)(1), and more stringent Section 214 requirements to prevent investment in unnecessary new plant and to bar service discontinuances in areas served by a single carrier. *See generally LEC In-Region Interexchange Order* at ¶¶ 85-86; *AT&T International Non-dominance Order*, 11 FCC Rcd at 17972-73; *Petition of GTE Hawaiian Telephone Co., Inc. for Reclassification as a Non-Dominant IMTS Carrier*, 11 FCC Rcd 20354, 20357 (Int'l Bur., 1996). In the *LEC In-Region Interexchange Order*, we concluded that the BOCs' and independent LECs' market power in the provision of local exchange and exchange access service did not warrant imposing these traditional dominant carrier safeguards on the BOCs' and independent LECs' provision of in-region and out-of-region domestic and international long distance services. We concluded that these safeguards generally were designed to prevent a carrier from raising prices by restricting its own output and that the BOCs and independent LECs could not leverage their local bottlenecks to this extent in the long distance marketplace. We also concluded that the benefits of these safeguards would be outweighed by the burdens that would be imposed on competition and that other statutory safeguards and regulations applicable to these carriers would address such concerns in a less burdensome and more effective manner. *LEC In-Region Interexchange Order* at ¶¶ 6-7. We noted in the *LEC In-Region Interexchange Order* the separate issue of whether a BOC, independent LEC, or any other U.S. carrier should be regulated as dominant in the provision of international service because of the market power of an affiliated foreign carrier in a foreign destination market. *Id.* at ¶ 8 n.22.

[419] *Foreign Participation Notice* at ¶¶ 82-114.

of a foreign carrier affiliation.[420] We expect final rules to be adopted in that proceeding on or before January 1, 1998, consistent with the U.S. Government's WTO commitments.

285. Contentions of the Parties. A number of parties have asked the Commission to regulate MCI as a dominant carrier on the U.S.-U.K. route after the merger.[421] Generally, these parties argue that BT controls bottleneck facilities in the United Kingdom and thus the merged entity will have the ability and the incentive to discriminate against unaffiliated U.S. carriers seeking to terminate U.S. international traffic in the United Kingdom. Parties in this proceeding also note that MCI, in a separate proceeding, has argued that BT remains the dominant carrier for international facilities-based services, controls over 90 percent of the termination points in the United Kingdom, and has the most fully developed long distance network to which international carriers must interconnect.[422] No party has argued for dominant carrier regulation of MCI on any other route.

286. Discussion. *U.S.-U.K. Route*. With respect to the United Kingdom, BT/MCI note that BTNA has separately requested a ruling that BT does not have the ability to discriminate against unaffiliated U.S. carriers through the control of bottleneck services or facilities.[423] As we found above, BT retains market power in the United Kingdom through its ownership of the only ubiquitous local and intercity networks in the United Kingdom.[424] Thus, under our rules, the merged entity is subject to our dominant carrier regulations. On our own motion, however, we waive the application of our current dominant carrier requirements to MCI pending the effective date of any new rules we adopt in the *Foreign*

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[420] The *Foreign Participation Notice* proposes to adopt basic and supplemental dominant carrier safeguards. The basic safeguards would apply where the foreign destination market has authorized multiple international facilities-based competitors. *Id.* at ¶ 84. These "basic" safeguards would require that carriers regulated as dominant on particular routes to: (1) file their service tariffs on one-day's (rather than 14-days') notice, and such tariffs would be presumed lawful; (2) file quarterly notification of circuit additions rather than obtain Section 214 approval before adding or discontinuing circuits; (3) file quarterly traffic and revenue reports; and (4) maintain records on the provisioning and maintenance of basic network facilities and services procured from a foreign carrier affiliate. Supplemental safeguards would apply to carriers that do not meet the basic safeguard standard, (*i.e.*, legal barriers to international facilities-based competition remain in the country of the foreign affiliate and that country has not yet authorized multiple international facilities-based competitors). *Id.* at ¶¶ 92-104.

[421] *See, e.g.*, WorldCom comments at 18; FT comments at 7; DT comments at 12-14; Frontier comments at 4. *See also* AT&T comments at 2-3, Sprint comments at 9.

[422] *See* AT&T comments n.8; FT comments at 7-8 (citing MCI Comments in Motion to be Reclassified as a Non-dominant Carrier for U.S.-U.K. Service, ISP 96-007-ND (filed Aug. 2, 1996)).

[423] BT/MCI application, Vol. 2, II.B, at 7.

[424] *See supra* Section IV.C.

Participation proceeding. Instead, we will require MCI to continue to comply with the safeguards we imposed on MCI in *BT/MCI I*,[425] which are similar to the proposed basic dominant carrier safeguards in the *Foreign Participation Notice*.[426] Once we adopt final dominant carrier regulations in the *Foreign Participation* proceeding, MCI will be fully subject to those requirements.

287. The Commission may waive its rules for "good cause shown."[427] Waivers are appropriate if special circumstances warrant a deviation from the general rule and such deviation will not undermine the policy served by the rule.[428] In this case, special circumstances warrant a deviation from the rule due to the short period of time between the consummation of the merger and the effective date of any new dominant carrier rules, which we expect to adopt by January 1, 1998, consistent with the U.S. Government's WTO commitments. We believe it would be unduly burdensome, and therefore not in the public interest, to require MCI at this time to comply with the current dominant carrier regulations which may be modified in a few months. Pending the effective date of the final rules in our *Foreign Participation* proceeding, MCI will continue to be subject to the safeguards imposed in *BT/MCI I,* which address our primary concerns with anti-competitive conduct by a foreign carrier with market power.[429] Given these factors and the short duration of the waiver period, we do not believe that waiving our dominant carrier safeguards at this time will undermine our general policies on dominant carrier regulation.

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[425] *BT/MCI I*, 9 FCC Rcd at 3973.

[426] *Foreign Participation Notice* at ¶ 92-103.

[427] 47 C.F.R. § 1.3.

[428] *See, e.g., WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[429] Our primary concerns with anti-competitive conduct by a foreign carrier that has market power include: (1) routing calls to the U.S. affiliate in proportions greater than those justified under our proportionate return policy; (2) otherwise inappropriately manipulating the calculations and settlements payments to favor the U.S. affiliate wrongfully; (3) routing low-cost proportionate return traffic to the U.S. affiliate, and leaving the rest to its competitor; (4) providing the U.S. affiliate better provisioning and maintenance intervals and better quality of service for essential facilities in the destination country, including the foreign circuit and termination facilities for private network services; (5) undercharging the U.S. affiliate and/or overcharging its competitors for use of the same essential facilities in the destination country; (6) revealing to the U.S. affiliate the confidential information that the foreign carrier receives from the U.S. affiliate's competitors; (7) giving the U.S. affiliate advance notice of network changes and other information that the U.S. affiliate and its competitors will need to know; (8) refusing to implement a new service or capability in correspondence with an unaffiliated U.S. carrier until the U.S. affiliate is able to provide the service or capability; or (9) either as an agent or through an affiliated third party, selling the services of the U.S. affiliate in ways that use the foreign carrier's home market power. *See Sprint Declaratory Ruling*, 11 FCC Rcd at 1859-1860. *See also supra* Section VI.E.

288. Our current rules permit carriers to argue that effective regulation in the destination market weighs in favor of non-dominant treatment.[430] We recognize OFTEL's active role in the United Kingdom in protecting against abuse of market power by BT. However, we do not believe that OFTEL's regulation of BT alone is sufficient to justify regulating MCI as non-dominant on the U.S.-U.K. route. Unaffiliated U.S. competitors of BT/MCI who must rely on BT in order to terminate traffic in the United Kingdom should be able to rely on our enforcement process to address complaints of discrimination. We also note that the *Foreign Participation Notice* proposes to eliminate consideration of the effectiveness of regulation in a destination market in determining whether to regulate a foreign-affiliated carrier as dominant on a particular route.[431]

289. Accordingly, we require MCI to continue to comply with the safeguards articulated in *BT/MCI I*. MCI will then be subject to any final rules regarding dominant carrier regulation adopted in our current *Foreign Participation* proceeding.

290. *U.S.-Gibraltar Route*. GibTel, which is owned by BT, is the monopoly provider of international telecommunications services in Gibraltar. BT/MCI request the Commission to forbear from imposing dominant carrier treatment for MCI's services on this route. BT/MCI argue that the Commission's decision in the *AT&T International Non-dominance Order* supports the request. In that decision, the Commission ruled that AT&T would not be classified as a dominant carrier on routes in which it was the sole facilities-based IMTS provider but on which the actual amount of U.S.-billed revenues on the route was *de minimis* compared to the overall number of total U.S.-billed revenues. The Commission found that on these routes dominant carrier regulation was not necessary to ensure that prices remain just and reasonable or to otherwise protect consumers. Moreover, the Commission found that the economic cost of regulating AT&T as dominant on such routes could actually impede, rather than promote, competitive market conditions.[432]

291. BT/MCI indicate that total U.S.-billed minutes to Gibraltar is *de minimis* in that it amounts to .00021 percent of total U.S.-billed minutes.[433] BT/MCI also argue that the rule forbidding special concessions will prevent discrimination against unaffiliated U.S. carriers. No one has challenged BT/MCI's request that MCI be regulated as a non-dominant carrier on the U.S.-Gibraltar route, and we conclude that it is appropriate at this time to forbear from

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[430] *See* 47 C.F.R. § 63.18(h)(8)(ii); *see also* 47 C.F.R. § 63.10(a).

[431] *Foreign Participation Notice* at ¶ 87.

[432] *AT&T International Non-dominance Order*, 11 FCC Rcd at 17998-99.

[433] BT/MCI application, Vol. 2, Part II.B at 6.

regulating MCI as dominant on the U.S.-Gibraltar route. We agree with BT/MCI that the amount of traffic on this route is *de minimis*. The economic costs of requiring MCI to adhere to our current dominant carrier requirements, which may be modified shortly in the *Foreign Participation* proceeding, are not justified for a route with such a low volume of traffic. These safeguards, including the 14 days' notice requirement for tariff changes, would have little practical utility in the near term in ensuring that rates on this route are just and reasonable and not unreasonably discriminatory. Nor do we foresee a near term need to control circuit additions or changes on this route by MCI or to require that MCI file quarterly traffic and revenue reports or maintain provisioning and maintenance records. BT/MCI are correct that our no special concessions prohibition, and other safeguards that we impose on all U.S. international carriers, will continue to apply to MCI's dealings with GibTel. We reserve the right, however, to revisit our determination to forbear from imposing dominant carrier regulation on MCI for the U.S.-Gibraltar route once final rules are adopted in the *Foreign Participation* proceeding.

292. *All other routes*. We find no reason to impose dominant regulatory treatment on MCI for service on any other route where BT and MCI currently have affiliates. We agree with the applicants that these affiliates (other than those in the United Kingdom and Gibraltar) lack market power. Consequently, we will continue to regulate MCI as a non-dominant carrier on all U.S.-international routes other than the U.S.-U.K. route.

B. Equal Access Implementation

293. As we noted above, a number of parties urge us to condition our approval of this merger upon the implementation of equal access in the United Kingdom.[434] BT/MCI observe that we have previously concluded that the lack of equal access does not preclude a finding of ECO or equivalency.[435] We continue to believe, however, that the swift implementation of equal access is necessary to eliminate the unfair competitive advantage BT and MCI would enjoy in providing end-to-end services between the United States and the United Kingdom after the merger. On July 28, 1997, MCI filed with the Commission a letter stating a commitment not to accept BT traffic originated in the United Kingdom to the extent equal access has not been implemented as required by the U.K. Government. We accept MCI's commitment on equal access.

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[434] *See, e.g.*, ACC comments at 7; AT&T comments at 4, 6-7; BellSouth/PacTel/SBC comments at 6, 23; Energis comments at 2; FT comments at 6, 9; WorldCom comments at 2-3.

[435] BT/MCI opposition & reply at 16 (citing *Foreign Carrier Entry Order*, 11 FCC Rcd at 3893); *ACC/Alanna*, 9 FCC Rcd at 6263 and *fONOROLA*, 7 FCC Rcd 7312, 7315 n.32 (1992).

294. Given the U.K. Government's proven record of implementing European Union telecommunications directives promptly and completely, we expect that the U.K. Government will follow the same course with respect to any European Union equal access requirement. We also expect, and will look to, the United Kingdom and the European Union to enforce vigorously such requirements when implemented. Accordingly, we condition grant of this license transfer upon MCI's non-acceptance of BT traffic originated in the United Kingdom to the extent BT is found to be in non-compliance with U.K. regulations implementing the European Union's equal access requirements.

C. Access to MCI's U.S. Backhaul Facilities

295. In its recent review of the merger, DoJ indicated that concerns had been raised about the availability of backhaul in the United States. DoJ noted that currently there are only three entities that own backhaul facilities from the TAT-12/13 cable stations located in the United States (AT&T, MCI and Sprint), and none of these entities are required to make backhaul facilities or services available to other carriers. DoJ has referred this matter to the Commission. It also has stated that it will later seek a modification of the Final Judgment if it concludes that BT/MCI could discriminate against new entrants by denying or delaying their access to backhaul facilities in the United States.[436]

296. On July 7, 1997, MCI filed with the Commission a letter stating a commitment to offer backhaul services as a condition of our approval of the merger. BT/MCI commit that MCI will offer backhaul capacity in four phases equivalent to 147 2-Mbps circuits between the TAT-12/13 cable stations located in the United States and two points served by MCI's existing backhaul facilities. For two years, MCI will make this backhaul capacity available on a first-come, first-served basis to any carrier that purchased from BT/MCI capacity that BT/MCI must sell as a condition of the European Commission approval of the mergers. These backhaul circuits will be available for one, two, three, four, and five year terms at prices that are substantially the same as the tariffed rates for similar domestic private line circuits, adjusted to recover costs related to the provision of backhaul services.[437]

297. We welcome BT/MCI's voluntary commitment to offer backhaul capacity in the United States. This commitment should help eliminate a potential bottleneck that the new competitors might otherwise face. New carriers purchasing capacity on TAT-12/13 from BT/MCI will now be assured of being able to obtain matching backhaul capacity in the United States. Consequently, this commitment should facilitate the introduction of increased

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[436] *Memorandum in Support of MFJ* at 14-15.

[437] Letter from Mary L. Brown, Senior Policy Counsel, MCI to Peter F. Cowhey, Chief, Int'l Bur., FCC (July 7, 1997).

competition on the U.S.-U.K. route. We thus condition our grant of the transfer in this case upon MCI selling the capacity it is committed to sell in accordance with its voluntary commitment, the terms of which are set forth in Appendix B.

D. Applicability of International Settlements Policy

298. Background. The Commission's international settlements policy (ISP) is designed to support competing U.S. carriers in their bilateral accounting rate negotiations with foreign carriers. This policy, which prevents foreign monopolies from using their market power to obtain discriminatory rate concessions from competing U.S. carriers (*i.e.*, "whipsawing"), requires: (1) the equal division of accounting rates; (2) nondiscriminatory treatment of U.S. carriers; and (3) proportionate return of inbound traffic.[438]

299. Our recent *Flexibility Order* took a critical step in reforming our settlement rate policies by recognizing that we should allow for entirely new alternatives to the traditional correspondent accounting rate model where competitive markets exist in both the originating and terminating markets.[439] Accordingly, we established a more flexible framework which permits carriers to take their IMTS traffic off the traditional settlement rate system where competitive conditions permit and to negotiate alternatives for terminating international calls that more closely track underlying costs.[440]

300. Contention of the Parties. Parties argue that the Commission should specifically impose the ISP on the U.S.-U.K. route for BT/MCI because of the potential for abuse and the cost advantages that otherwise will accrue to BT/MCI.[441] Parties also urge the Commission either to impose structural safeguards to ensure the new merged entity's compliance with the ISP or to initiate a separate proceeding to address accounting rate and

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[438] *See* Implementation and Scope of the International Settlements Policy for Parallel Routes, *Report and Order*, 51 Fed. Reg. 4736 (Feb. 7, 1986), *modified in part on recon.*, 2 FCC Rcd 1118 (1987), *further recon.*, 3 FCC Rcd 1614 (1988). *See also* Regulation of International Accounting Rates, *Report and Order*, 6 FCC Rcd 3552 (1991), *on recon.*, 7 FCC Rcd 8049 (1992).

[439] Regulation of International Accounting Rates, Phase II, *Fourth Report and Order*, 11 FCC Rcd 20063 (1996) (*Accounting Rate Flexibility Order*).

[440] Pursuant to the *Accounting Rate Flexibility Order*, U.S. carriers may negotiate alternative international settlement payment arrangements that deviate from the requirements of our ISP where appropriate market and regulatory conditions permit. We noted that the ISP's restraints on competition may be counterproductive in markets where competitive forces are emerging. *Accounting Rate Flexibility Order*, 11 FCC Rcd at 20069.

[441] *See, e.g.*, AT&T comments at 15 (arguing that the combination of relaxing legal proportionate return rules on this route and the lack of equal access will provide BT/MCI cost advantages); FT comments at 8-11; Frontier comments at 4-5.

international traffic flow deviations.[442] FT and Worldcom argue that the ISP requirements should not be removed unless the Commission grants a specific request of the newly merged entity.[443]

301. The U.K. Government argues that the economic welfare of both the United Kingdom and the United States would be augmented and the degree of competition would be enhanced if there is a multiplicity of operators with end-to-end control.[444] The U.K. Government points out that the United Kingdom has lifted the requirements for parallel accounting and proportionate return for routes that are subject to competition, including the U.S.-U.K. route. Retention of proportionate return, according to the U.K. Government, reduces the flexibility of operators to pass and receive different volumes of traffic.[445]

302. BT/MCI argue that the parties' concerns about ISP flexibility on the U.S.-U.K. route after the merger are misplaced in the short term and, in the longer term, are antithetical to the pro-competitive thrust of the FCC's *Flexibility Order*. BT/MCI argue that no special license conditions are needed because the services offered by MCI and BT will continue to be governed by the ISP until the FCC approves an alternative arrangement after public notice and comment. However, as competition grows on the U.S.-U.K. route, the need for strict adherence to the ISP will dissipate.[446]

303. Discussion. We agree with BT/MCI that the services offered by BT and MCI will be governed by our ISP until such time as MCI proposes -- and we approve -- an

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[442] DT comments at 12-13; FT comments at 8-11.

[443] FT comments at 8-11; WorldCom reply comments at 9.

[444] The U.K. Government states that BT currently does not have end-to-end control, although AT&T, Worldcom, Sprint, ACC and other companies do. U.K. Government reply comments at 32.

[445] U.K. Government reply comments at 32-34. The U.K. Government also argues that, although it agrees with the overall policy of our *Flexibility Order*, it believes the Commission has placed a greater emphasis on regulation than on competition. Our requirement that operators with a market share of 25 percent or greater on any in-bound or outbound route ensure that their arrangements do not contain unreasonably discriminatory terms and conditions will inhibit the reduction of prices, according to the U.K. Government, because a lower accounting rate offered to one other party would immediately be available to all other parties. Awareness of the price would lead other parties to make simultaneous price reductions, consequently no rational operator would reduce its price because no compensatory gain in market share would result. *Id.* at 34.

[446] BT/MCI opposition & reply at 30-31.

alternative arrangement under our *Flexibility Order*.[447] Until then, there is no record evidence to support the need for special safeguards to enforce this requirement on BT and MCI. Moreover, given our finding above that the United Kingdom provides effective competitive opportunities to U.S. carriers and the increasing competitiveness of this route, we see no reason to foreclose the possibility of future flexible arrangements between BT and MCI or other carriers on this route.

E. Applicability of "No Special Concessions" Requirement

304. Background. We currently prohibit all U.S. carriers, regardless of their regulatory status or whether they have a foreign affiliate, from agreeing to accept special concessions from any foreign carrier or administration.[448] MCI's Section 214 authorizations were amended under *BT/MCI I* to prohibit MCI from agreeing to accept, directly or indirectly, any special concessions from any foreign carrier or administration with respect to traffic or revenue flows between the United States and any foreign country. Numerous other cable landing licenses and Section 214 authorizations held by MCI and its subsidiaries contain essentially the same prohibition against accepting "exclusive arrangements" from any foreign carrier or administration.[449]

305. Contentions of the Parties. DT and FT urge the Commission to make clear that its "no special concessions" requirement applies to MCI's dealings with BT.[450] Sprint and DT also argue that there are special dangers entailed by the vertical integration of BT and MCI and that the Commission should prohibit the use of confidential information of unaffiliated U.S. carriers obtained by the new Concert or its subsidiaries to benefit MCI.[451]

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[447] We will examine such flexibility requests on a case-by-case basis after interested parties have had a full opportunity to comment.

[448] *See* 47 CFR § 63.14. The Commission's Rules define "special concessions" as "any arrangement that affects traffic or revenue flows to or from the United States that is offered exclusively by a foreign carrier or administration to a particular U.S. international carrier and not also to similarly situated U.S. international carriers authorized to serve a particular route." 47 C.F.R. § 63.18(i)(1).

[449] *See, e.g.*, AT&T, MCI Int'l, *et al.*, *Cable Landing License*, 7 FCC Rcd 130, 132-33 (1992) (*TAT-10 Cable Landing License*); MCI Telecommunications Corp., *Memorandum Opinion, Order and Authorization*, 10 FCC Rcd 3187 (Int'l Bur., 1995) (Section 214 authorization to provide switched services via international private lines interconnected to the public switched networks in the United States and the United Kingdom).

[450] DT comments at 11; FT comments at 9-10, reply comments at 13-14.

[451] DT comments at 14; Sprint comments at 8-10.

306. Discussion. We confirm that, after the BT/MCI merger is consummated, the services offered by MCI generally, including its dealings with BT, will continue to be governed by our "no special concessions" requirement as articulated in *BT/MCI I*.[452] These prohibitions will ensure that BT will not be able to leverage its control over bottleneck services and facilities in the United Kingdom into the U.S. international services market. Without these prohibitions, for example, BT could use its market power in the United Kingdom to discriminate against unaffiliated U.S. carriers by offering MCI better provisioning and pricing of facilities and services. Continued application of the "no special concessions" rule to MCI is therefore consistent with our goal of promoting competition on the U.S.-U.K route.[453]

307. We also note that in our *Foreign Participation Notice*, we propose to give greater specificity to our "no special concessions" requirement by delineating the types of conduct that we consider to be prohibited by this requirement.[454] Any final rules adopted in our current *Foreign Participation* proceeding regarding the no special concession requirements will apply to this merger.

VII. OTHER MATTERS

A. Number Portability

308. A number of parties raise concerns that the United Kingdom has been slow to implement some forms of number portability, particularly portability of "non-geographic" numbers (*i.e.*, numbers such as those used for 800 services and country direct services).[455]

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[452] *See BT/MCI I*, 9 FCC Rcd at 3967.

[453] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3972.

[454] We proposed to interpret the no special concessions provision to prohibit any U.S. carrier from agreeing to accept from a foreign carrier with market power in the destination country an exclusive arrangement that affects traffic or revenue flows to or from the United States not offered to similarly situated U.S. carriers involving: (1) operating agreements for the provision of basic telecommunications services; (2) distribution or interconnection arrangements, including pricing, technical specifications, functional capabilities, or other quality and operational characteristics, such as provisioning and maintenance times; (3) any information, prior to public disclosure, about a foreign carrier's basic network services that affects either the provision of basic or enhanced services or interconnection to the foreign country's domestic network by U.S. carriers or their U.S. customers; (4) any proprietary or confidential information obtained by the foreign carrier from competing U.S. carriers in the course of regular business activities with such U.S. carriers, unless specific permission has been obtained in writing from the U.S. carrier involved; and (5) arrangements for the joint handling of basic U.S. traffic originating or terminating in third countries. *Foreign Participation Notice* at ¶ 117.

[455] *See, e.g.*, ACC comments at 9-10.

According to the U.K. Government, the regulatory regime in the United Kingdom obliges BT to provide portability of all numbers, regardless of the services for which they are used. In the case of non-geographic numbers, however, BT needed some additional time to undertake some network systems development.[456] Thus, at the time of BT/MCI's application, BT only provided portability of "geographic numbers" (*i.e.*, numbers assigned to residential and business customers).[457]

309. In its comments, the U.K. Government stated it expected that the portability of non-geographic numbers would become available starting in July 1997.[458] Recently, OFTEL confirmed that implementation of non-geographic number portability has in fact been introduced by fixed network operators.[459] Accordingly, given that number portability by fixed network operators is now available for both geographic and non-geographic numbers (including country direct services), we decline to impose any number portability requirements as a condition of approval of this merger. We anticipate the U.K. Government will ensure the full roll-out of number portability of "non-geographic" numbers as quickly as possible to promote full competition among U.K. carriers.

B. Reorigination and Switched Hubbing

310. Contention of the Parties. AT&T requests the Commission to prohibit BT from routing foreign-originated minutes through MCI in the United States to third countries.[460] AT&T claims that a merged BT/MCI will be able to raise unaffiliated U.S. carriers' costs on U.S.-third country routes through selective reorigination of BT-third country traffic through MCI's U.S. network. According to AT&T, BT will be able to send to third countries only that volume of minutes that matches the volume each third country sends to it, with the result that BT would have no settlements outpayment. Additional minutes generated by BT's customers would then be delivered through MCI's network, thereby earning MCI greater proportionate return minutes than it would have had absent BT's reoriginated traffic. AT&T

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[456] U.K. Government reply comments at 17.

[457] OFTEL, *The National Numbering Scheme*, at ¶¶ 71-72 (Jan. 1997). OFTEL defines number portability as "a facility whereby customers are able to keep their telephone numbers when they change operators." *Id.* at ¶ 71.

[458] U.K. Government reply comments at 17. *See also* OFTEL, *Number Portability: Modifications to Fixed Operators' Licenses* at ¶ 9.2 (April 1997).

[459] *See* OFTEL, *Number Portability in the Mobile Telephony Market* (July 1997) at ¶ 2.16. OFTEL will require mobile operators to provide number portability by June 30, 1998. *Id.* at ¶ 2.12.

[460] AT&T comments at 19-21.

claims that MCI's additional return minutes would lower its settlements costs on third-country routes while those of its U.S. competitors would rise correspondingly.[461] In response, BT/MCI argue that reorigination is an industry-wide matter that should be considered in a separate rulemaking proceeding, if at all.[462]

311. AT&T further claims that BT/MCI will have an unfair short-term advantage over unaffiliated carriers seeking to hub traffic through the United Kingdom (a practice known as "switched hubbing") since BT is the only U.K. carrier with direct facility arrangements with all foreign points. As such, AT&T states that BT will be uniquely situated to capture a significant share of third-country traffic destined to the United States that it can hub through the United Kingdom.[463]

312. Discussion. At this time, we decline to restrict BT/MCI's ability to reoriginate BT-third country traffic via MCI's U.S. network, or hub third-country traffic destined to or from the United States through the United Kingdom. The Commission has not found that reorigination should be prohibited or limited generally[464] and we perceive no need to impose such a restriction uniquely on BT/MCI. We may revisit this issue in the future if it appears that distortions in settlement payments or proportionate return traffic are so great as to justify restricting this practice. For now, however, AT&T (and other U.S. carriers) will have an equal incentive and ability as BT/MCI to reoriginate traffic through the United States. Consequently, we find no reason to impose any restrictions regarding reorigination on BT/MCI.

313. As for BT/MCI's advantages with respect to switched hubbing on the U.S.-U.K route, we note that any U.S. carrier authorized on this route has the ability to engage in switched hubbing.[465] BT/MCI may have a short-term advantage due to BT's greater number of correspondent relationships on U.K.-third country routes. However, there is no record evidence to indicate that BT's competitors will be disadvantaged in establishing correspondent relationships on U.K.-third country routes such that restrictions on BT/MCI's ability to engage in switched hubbing on the U.S.-U.K. route are warranted.

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[461] *Id.*

[462] BT/MCI opposition & reply at 30 n.69.

[463] *Id.* at 19 n.28.

[464] We note that MCI has pending before the Commission a petition for declaratory ruling that reorigination of traffic through the United States violates FCC rules and policies. *See* MCI Petition for Declaratory Ruling, ISP-95-004 (filed Feb. 2, 1995).

[465] *See Foreign Carrier Entry Order,* 11 FCC Rcd at 3936-3939.

C. Structural Separation of U.S. and U.K. Affiliates

314. Contention of the Parties. Some parties argue that, at a minimum, MCI must remain a separate entity (*i.e.*, maintain separate books of accounts) from all other subsidiaries of its U.K. parent (Concert).[466] Without such separation, these parties argue, it would not be clear whether the price, terms, and conditions that BT/MCI offers itself are different from those it offers to competitors. Thus, according to Sprint, all agreements between MCI, on the one hand, and Concert and all other subsidiaries of Concert, on the other, which affect traffic and revenue flows in the U.S. international market should be: (1) on an arms-length basis; (2) reported to the FCC; (3) made available for public inspection; and (4) offered to all U.S. carriers. FT and DT argue that there should be structural and accounting separation between the national (U.K. and U.S.) and international operations of the combined BT/MCI. DT also argues that there should be non-discrimination requirements that the separate entities offer third parties the same terms, conditions and rates they offer each other, including international accounting and settlement rates. According to DT, where a unified company owns facilities at both ends of a route, the FCC's ISP requirements of proportionate return, nondiscrimination, and no special concessions lose their effectiveness.[467]

315. BellSouth/PacTel/SBC note that BOCs will, for a minimum of three years, provide in-region interLATA service pursuant to the structural safeguards of Section 272, backed up by implementing regulations designed to prevent improper cost allocation and discrimination between the BOC and its Section 272 affiliate. BellSouth/PacTel/SBC also argue that MCI's assertions that local, intercity and international operations can be operated by a single entity without any risk to competition in the United Kingdom are also true for BOCs in the United States.[468]

316. In response, BT/MCI argue that BT's operations are governed by a comprehensive set of U.K. and E.C. competitive safeguards that protect new entrants against anti-competitive practices and that the license conditions sought by FT, DT, and Sprint are duplicative of existing requirements.[469] BT/MCI note that BT's license prohibits BT from subsidizing its competitive operations from its local service, and rigorous cost allocation

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[466] Sprint comments at 8; *see also* DT comments at 11-12; FT comments at 6-7.

[467] Specifically, DT argues that a unified BT and MCI would have both the motive and the opportunity to cross-subsidize and discriminate and that the U.K. safeguards will not suffice because of the global dimension of a unified BT and MCI. DT comments at 13.

[468] BellSouth/PacTel/SBC comments at 11-12.

[469] BT/MCI opposition & reply at 22-25. BT/MCI argue that the FCC should not extend its authority to cover U.K. jurisdictional matters that OFTEL has "well in hand." *Id.* at 24-25.

procedures ensure compliance and require nondiscriminatory treatment by BT of its competitors.[470] BT/MCI also note that MCI will be a subsidiary of Concert separate from BT. Thus, MCI's Section 214 authorizations will be held by the same MCI subsidiaries that hold them today, not by Concert. Any change to this structure would be preceded by additional applications for authority under Section 214 or for other appropriate Commission approval, BT/MCI argue.

317. Discussion. Although our current rules do not require structural separation among MCI and its affiliates, our *Foreign Participation Notice* seeks comment generally on whether we should require some level of structural separation between a U.S. carrier and its affiliated foreign carrier.[471] BT/MCI would be subject to whatever rules of general applicability are adopted in the *Foreign Participation* proceeding. Moreover, the applicants specify that MCI will continue to hold FCC authorizations and licenses as a subsidiary of Concert separate from BT. Any significant change to this structure must be preceded by additional applications for Section 214 authority or for Commission approval of appropriate transfer or assignment of license applications.[472] Accordingly, we will have the opportunity to review any such changes to ensure they do not raise anti-competitive concerns. The parties have not demonstrated in this record that this merger creates special concerns that warrant safeguards in addition to those imposed under our current rules that apply to all other foreign carriers with U.S. affiliations, whether the affiliation is created through a merger or otherwise. Accordingly, we conclude that imposing structural separation between MCI and BT or the creation of new structurally separate affiliates is not necessary as a condition of our approval of this merger. We reiterate, however, that any new approach adopted in our current *Foreign Participation* proceeding will apply to this merger.

VIII. CONCLUSION

318. For the reasons discussed above, we grant the applicants' request to transfer control of MCI's licenses and authorizations to BT.

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[470] BT/MCI opposition & reply at 24 (BT/MCI argue that the following conditions, discussed above, ensure against discrimination: Conditions 13 (interconnection), 16 (publication of charges and terms), 16A (publication of interconnection agreements), 16B (standard services), 17 (prohibition on undue preference and discrimination), 17A (differential charging), 17B (prohibition on undue preference and discrimination in quality of service), and 18 (prohibition on cross-subsidies)). *Id.* n.58.

[471] *Foreign Participation Notice* at ¶¶ 111-113.

[472] BT/MCI opposition & reply at 23.

IX. ORDERING CLAUSES

319. Accordingly, IT IS ORDERED that the applications filed by MCI Communications Corporation and British Telecommunications plc in this proceeding, GN Docket No. 96-245, are GRANTED.

320. IT IS FURTHER ORDERED that MCI shall be regulated as a dominant carrier, pursuant to Section 214 of the Act, 47 U.S.C. § 214, and Section 63.10 of the Commission's Rules, 47 C.F.R. § 63.10, on the U.S.-U.K. route.

321. IT IS FURTHER ORDERED that MCI shall not be subject to the application of the Commission's dominant carrier regulations until final rules regarding dominant carrier regulation are effective in the Commission's *Foreign Participation* proceeding.

322. IT IS FURTHER ORDERED that MCI shall continue to comply with the safeguards imposed in *BT/MCI I* until final rules regarding dominant carrier regulation are effective in the Commission's *Foreign Participation* proceeding.

323. IT IS FURTHER ORDERED THAT grant of this license transfer is conditioned upon MCI's non-acceptance of BT traffic originated in the United Kingdom to the extent BT is found to be in non-compliance with U.K. regulations implementing the European Union's equal access requirements.

324. IT IS FURTHER ORDERED THAT MCI and Concert shall make available backhaul capacity equivalent to 147 E-1 circuits between the TAT-12/13 cable stations located in the United States and point(s) served by MCI's existing backhaul facilities, in accordance with MCI's voluntary commitments (*see* Appendix B).

325. IT IS FURTHER ORDERED THAT MCI's licenses and authorizations are subject to the outcome of all final rules of general applicability adopted in the Commission's *Foreign Participation* proceeding.

326. IT IS FURTHER ORDERED THAT MCI is subject to the outcome of all rules of general applicability relating to DBS licenses and the outcome of any pending applications for review of MCI's license grant.

327. IT IS FURTHER ORDERED THAT the authorization and the licenses related thereto are subject to compliance with provisions of the Agreement between BT, MCI, and the United States Department of Defense and Federal Bureau of Investigation, dated May 22, 1997, which Agreement is fully binding upon Concert and its subsidiaries providing

telecommunications services within the United States, and which provides that: (1) all facilities for network management of MCI's domestic U.S. telecommunications infrastructure and all Concert facilities used to direct, control, supervise, or manage telecommunications within the United States shall be in the United States; (2) Concert's subsidiaries providing domestic telecommunications services shall adopt and maintain certain policies and measures for preventing the improper use of Concert's network and facilities for unauthorized electronic surveillance and unauthorized access to, or use or disclosure of, Customer Proprietary Network Information in violation of U.S. law or the Agreement; (3) Concert's subsidiaries providing domestic telecommunications services shall adopt and maintain certain policies and measures for protecting the confidentiality and security of electronic surveillance orders and authorizations, other orders, legal process, and statutory authorizations and certifications related to subscriber records and information; and (4) Concert's subsidiaries providing domestic telecommunications services shall implement certain measures requiring personnel security clearances, the use of trustworthy persons who have passed appropriate U.S. Government background checks, secure storage facilities, and the prevention of access by unauthorized personnel to secure or sensitive network facilities and offices, all as covered in the Agreement. Nothing in this Agreement or the Implementation Plan referenced in the Agreement is intended to limit any obligation imposed by Federal law or regulation including, but not limited to, 47 U.S.C. § 222(a) and (c)(1) and the FCC's implementing regulations. This Condition shall also be binding upon any and all successors to and assigns of BT, MCI, and Concert with respect to the provision of U.S. telecommunications service.

328. IT IS FURTHER ORDERED that BT shall submit within 90 days of the release of this decision a waiver of any claim to immunity from U.S. antitrust laws acting in its capacity as signatory to INTELSAT under the court's decision in *Alpha Lyracom v. Comsat* (see *supra* note 136) as such immunity may apply to BT's provision of services in the United States.

329. IT IS FURTHER ORDERED that the Petition to Deny of Bell Atlantic IS DENIED.

330. This Order is effective upon release. Petitions for reconsideration under Section 1.106 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary